Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT SALERNO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Despite the fact that before trial the defendant indicated that he did not intend to contest the existence of the "enterprise," the Seventh Circuit, absent citation or discussion of this Court's recent opinion in *Old Chief v. United States*, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), upheld the district court's decision permitting the government to introduce many criminal acts allegedly committed by the defendant, but not specifically charged in the indictment, as proof of the "enterprise" element of the charged offenses of committing and conspiring to commit murder to maintain position in an enterprise.

Did the introduction of voluminous other crimes evidence to prove an essential element not contested by the defendant violate this Court's construction of Rule 403 of the Federal Rules of Evidence as set forth in *Old Chief*?

2. The Seventh Circuit upheld the district court's finding of a lack of violation of the Speedy Trial Act in spite of a 17 month lull between the declaration of a mistrial and the government's announcement of intent to retry the defendant.

Did the lower courts properly construe the Speedy Trial Act where the courts ruled that non-adherence to the specific time limits set forth in 18 U.S.C. § 3161(h)(1)(A)-(J) can be avoided by labeling the proceeding causing delay a generic "other proceeding" (for which specific time limits are not delineated) within the introductory language of 18 U.S.C. § 3161(h)(1)?

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PRAYER

Petitioner Robert Salerno respectfully prays that a writ of *certiorari* issue to review the judgment and order of the Seventh Circuit. In the alternative, Petitioner Robert Salerno respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment for further consideration in light of this Court's decision in *Old Chief v. United States*, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), or grant any other appropriate relief.

OPINIONS BELOW

The Seventh Circuit's opinion affirming Salerno's criminal conviction is published at 108 F.3d 730. *See* Appendix A. The district court's opinion permitting the government to introduce evidence of acts not charged in the indictment is not published, but can be accessed at 1995 WL 66347. *See* Appendix C. The district court's opinion denying Salerno's motion to dismiss based upon an alleged violation of the Speedy Trial Act is not published, but can be accessed at 1994 WL 30955. *See* Appendix B.

JURISDICTION

On March 4, 1997, the Seventh Circuit affirmed Petitioner Robert Salerno's life sentence and criminal conviction for murder and conspiracy to commit murder to maintain position in an enterprise, 18 U.S.C. § 1952B (1984), now cited as 18 U.S.C. § 1959. A petition for rehearing was not filed. This petition is filed within 90 days of the order affirming Salerno's criminal conviction and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

1. Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Rule 404(b) of the Federal Rules of Evidence provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Fed. R. Evid. 404(b).

2. The provisions of the Speedy Trial Act pertinent here provide:

> The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
> >
> > * * *
> >
> > > (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

* * *

> (7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

18 U.S.C. § 3161(h).

STATEMENT OF THE CASE

A. *Procedural Background*

A grand jury returned a multi-count superseding indictment against 20 individuals, including Robert Salerno. R. 2145. The indictment charged Salerno and others with RICO conspiracy, and named Salerno in three RICO predicate acts and two substantive counts. Count 8 charged that between the fall of 1984 and February 7, 1985, Rocco Infelise, Louis Marino, Salvatore DeLaurentis, Robert Bellavia and Salerno conspired to murder Hal Smith to maintain their positions in the enterprise, 18 U.S.C. § 1952B (1984), now cited as 18 U.S.C. § 1959. *Id.* Count 9 charged the same defendants with murdering Smith on February 7, 1985, in violation of 18 U.S.C. § 1952B. *Id.* The district court had jurisdiction over these offenses pursuant to 18 U.S.C. § 3231.

Infelise, Marino, DeLaurentis, Bellavia and Salerno underwent a lengthy jury trial. On March 10, 1992, the jury found Salerno not guilty of RICO conspiracy and certain racketeering acts not proven. The jury did not return verdicts on Counts 8 or 9, or make findings on the corresponding racketeering acts.

Seventeen months later, the government announced intention to retry Salerno. Of the original trial defen-

dants, only Salerno faced retrial.[1] Salerno filed a motion to dismiss based upon an alleged violation of the Speedy Trial Act. The district court, however, denied Salerno's motion. *United States v. Salerno*, 1994 WL 30955 (N.D. Ill. 1994).

Not only did the government seek to retry Salerno, it also sought to admit evidence of alleged other crimes not introduced at the first trial. Some of the alleged other acts were the subjects of previous federal prosecutions of Salerno, resulting both in convictions and acquittals. Despite Salerno indicating that he would not be contesting the existence of the "enterprise" at trial, the government claimed that the other crimes evidence was necessary to prove the "enterprise" element of the § 1952B charges. The district court allowed the government to introduce other acts evidence. *United States v. Salerno*, 1995 WL 66347 (N.D. Ill. 1994).

B. *Evidence Surrounding The Charged Offenses*

Commencing in about 1979, William Jahoda was a principal of the Good Ship Lollypop, the gambling faction of the Joseph Ferriola Street Crew (the charged enterprise). While Jahoda divvied gambling profits with others, Jahoda did not make any payments to Salerno. Tr. 1199. In fact, Jahoda hardly knew Salerno who had nothing to do with the Good Ship Lollypop. Tr. 948, 965, 1198.

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[1] All the other trial defendants were found guilty of something, and the district court imposed lengthy prison sentences. *See United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996).

Jahoda also acted as a collector; he and others detailed the endeavors at trial. *E.g.*, Tr. 830-40. Hal Smith, an "independent" bookmaker, was one individual asked to pay tribute. Tr. 1334-38. Smith later resisted payment, drawing DeLaurentis' ire. Tr. 147-55, 176-77, 1471. DeLaurentis' efforts to extract payment from Smith resulted in a meeting in which Smith and DeLaurentis argued over who had more money and power, and threw money at each other. Tr. 172-73, 1324. Smith implored DeLaurentis to leave before he kicked his "olive oil smelling ass" back to Sicily. Tr. 173. DeLaurentis predicted that Smith was "trunk music." *Id.*

In March 1984, Infelise asked Jahoda to locate Smith so DeLaurentis could collect tax. Jahoda claimed that Salerno, Bellavia, Marino, Infelise and himself looked for Smith in the spring and summer of 1984. Tr. 939-70.

In late January 1985, Infelise requested Jahoda to get Smith to Jahoda's house, described by Infelise as a perfect place to "gargle" somebody. Tr. 978, 985-86, 1248-49. On February 7, 1985, Smith, accompanied by Jahoda, drove to Jahoda's home, and parked in the driveway. Tr. 1001-02. Jahoda told Smith to go inside and make himself at home while Jahoda retrieved mail. Tr. 1003. Jahoda claimed that while walking up the driveway he saw (through a pane with opened half curtains) Smith and Salerno in the living room. Tr. 1015, 1024.

Jahoda went into the garage and waited. Tr. 1024. Infelise entered the garage and returned to the house. Tr. 1025. Jahoda testified he saw Bellavia and parts of Smith's legs prone on the floor when Infelise opened the door. *Id.* According to Jahoda, although it was a cold winter night, the door remained open, and Jahoda, sup-

posedly in the corner of the garage, saw Salerno standing in front of Smith, and Marino's hand in Smith's overcoat pocket. Tr. 1029, 1280, 1292-93.

Infelise and Jahoda entered a car in the garage. Tr. 1036. Infelise proclaimed Smith pulled a gun on Marino, but gestured to remain quiet as if the car was bugged. Tr. 1036, 1269. Infelise instructed Jahoda to burn his clothes, and dropped off Jahoda at a tavern. Tr. 1036-39, 1492-94.

Jahoda returned home later that evening. Infelise phoned, and told Jahoda that Marino thought Smith left a cigar and/or glasses. Tr. 1051. Jahoda noticed a bucket, mop and the kitchen floor freshly scrubbed. Tr. 1047-48. Jahoda also found a brown bag, a plastic bag for vinyl twine and a hardware store receipt, all of which Jahoda discarded. Tr. 1049, 1053.

On February 10, 1985, police found Smith's body in the trunk of his car, parked in a hotel parking lot. Tr. 178-190. Smith had been stabbed and strangled. Tr. 1569-90.

Jahoda became an informant in April 1989. Tr. 1309. In his second debriefing with the government, Jahoda mentioned the Smith murder, Bellavia, Marino and Infelise, but not Salerno. Tr. 1342-43.

Jahoda secretly recorded discussions with Infelise and Bellavia. Tr. 1072-1104. When Jahoda recorded Infelise, Jahoda did not say Salerno participated in the murder, and only mentioned four individuals being involved. Tr. 1350-58. In a conversation with Bellavia, Jahoda did not ask any questions about Salerno, but said Salerno left "it"—an alleged reference to the vinyl clothesline. Tr. 1104, 1360-62. Bellavia, however, did not confirm Jahoda's allegation. Tr. 1360-63.

On November 1, 1989, Jahoda went into Salerno's fish store, and conversed with Salerno. Tr. 1110-16. Jahoda did not overtly mention the Smith murder, but referred to "shit in Lake County." Tr. 1366. Salerno explained he did not have much contact with Infelise, was not making any money and requested a loan. Tr. 1123; Supp.R. 2228, Nov. 1, 1989 Tr.

Jahoda returned to the fish store the next day. Tr. 1370. Jahoda told Salerno he talked to "our guy" yesterday, and that "he" wanted Jahoda to give Salerno an update. Tr. 1117. Jahoda showed Salerno a subpoena, and opined Infelise made a mistake that night by calling from the outside. Tr. 1117-19. Salerno repeatedly said he did not want to discuss the matter, was more concerned about a $49 fish order and did not admit participation in the murder. Tr. 1367, 1372-73. Jahoda remarked everybody had been promoted, and Salerno responded he was at the bottom. Tr. 1120-21.

C. *Other Act Evidence*

Although not specifically charged as offenses in the indictment, the district court allowed the government to introduce the evidence described below:

David Kopulos: David Kopulos worked as a bookmaker between 1978 and 1982. Tr. 209. In 1978, Kopulos received a phone call from Bobby, who wanted to meet because Kopulos was in "their business." Tr. 211. Thereafter, Kopulos commenced paying monthly street tax installments to various individuals. Tr. 213-18. In about 1981, a collector, John Manzella told Kopulos he was having problems, and that Bobby would be picking up the payments. Tr. 221-22. Kopulos later provided the

money to a Mike, who usually was accompanied by Salerno. Tr. 221-24.

Joel Ross: Between 1976 and 1985, Ross owned an adult movie theater featuring exotic dancers. Tr. 85, 112-13. In May 1983, three individuals visited Ross at the theater. Tr. 88-89. Several days later, one of the visitors returned, and introduced Ross to Salerno. Tr. 90-91. Ross explained he was not "with" anybody, and Salerno responded that Ross would be with "us." Tr. 91-92. Ross later met Salerno, who remarked that all of the Chicago theaters were paying $10,000 per month, and Ross would have to pay. Tr. 92-94.

Ross subsequently received a call from Salerno, asking to meet and saying they would pick up Ross' wife and son if Ross refused. Tr. 96. Ross met Salerno the next evening. Tr. 97. Salerno requested payment, but Ross produced a letter documenting overdue payroll taxes. Tr. 97-98, 132-33. Salerno took the letter, and said he would show it to his people. Tr. 98. A few weeks later, Salerno told Ross they did not want the money. Tr. 98-99, 133. Others later reinitiated collection efforts, and when Ross contacted Salerno about this, Salerno said that Ross would have to deal with them. Tr. 101.

Richard Mara: After a request for a favor from Jimmy Inendino (one of Richard Mara's bosses), Mara disposed of Salerno's daughter's vehicle. Tr. 371-79. Mara recalled that Salerno once admonished him for using an associate's name. Tr. 383-84. At the racetrack during the late 1970's, Mara directed others to Salerno for loans. Tr. 383. Mara also described attempts to fix horse races in the 1970's. Tr. 388, 403-05. Mara claimed that in late 1977 Salerno punched a jockey for not fixing a race as planned. Tr. 388-403.

William Jahoda: In 1977, Jahoda was in a bookmaking partnership with Salvatore Sammarco. Tr. 733-34. Salerno made overtures about collecting street tax. *Id.* After a series of discussions and meetings in which Jahoda and Sammarco attempted to avoid the payments, Jahoda paid $500. Tr. 742-43. Jahoda testified he again met Salerno, in the company of Michael Sarno. Tr. 744. According to Jahoda, Salerno instructed Jahoda to pay Sarno in the future. Tr. 745. At Salerno's direction, Jahoda made the later payments to Sarno. Tr. 744-47.

Carmen Migliore: According to Migliore, on some unknown date, Salerno came into his warehouse and said Migliore owed somebody $10,000. Tr. 290, 321. Migliore testified he did not owe anybody $10,000, and so informed Salerno. Tr. 290-91. Migliore called John Manzella (who later employed Migliore as a bookmaker in the 1978 football season). Tr. 301-04. Manzella said he was familiar with Salerno's name, and that they were "serious people." Tr. 291-94, 316. Around May 1978, Migliore purportedly met Salerno. Tr. 294-95, 299. At one of the meetings, two unknown persons accompanied Salerno, and Salerno supposedly said one of them was there to see what Migliore looked like so he could kill him. Tr. 296-99, 322, 325. Migliore claimed he ultimately paid Salerno $10,000 by obtaining a loan. Tr. 300-02.

George Boulahanis: In 1979, George Boulahanis began bookmaking at the race track. Tr. 574-75. Jasper Campiesi, an alleged outfit member, informed Boulahanis that Salerno wanted to see him. Tr. 575-76, 580-81. Salerno told Boulahanis the tax was $300 weekly, and Boulahanis owed for a previous month. Tr. 577. Tr. 588-90, 598-600.

REASONS FOR GRANTING THE PETITION

I.

THE SEVENTH CIRCUIT UPHELD THE ADMISSION OF EXTENSIVE EVIDENCE OF THE DEFENDANT COMMITTING CRIMINAL ACTS NOT CHARGED IN THE INDICTMENT, OFFERED TO PROVE AN ESSENTIAL ELEMENT NOT CONTESTED BY THE DEFENDANT. THE SEVENTH CIRCUIT, HOWEVER, COMPLETELY FAILED TO ADDRESS THIS COURT'S RECENT DECISION IN *OLD CHIEF v. UNITED STATES*, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), AND THE SEVENTH CIRCUIT'S ANALYSIS CONTRAVENES THE PRINCIPLES ANNOUNCED IN *OLD CHIEF*.

At Salerno's retrial, the government sought to admit a host of other crimes allegedly committed by Salerno. The government's bid was problematic. Most of the other crimes were not offered at the first trial. Moreover, Salerno was acquitted of RICO at the first trial, with the jury expressly finding that Salerno did not agree to certain specified racketeering acts, including the alleged 1977 extortion of William Jahoda. R. 2120-21. In total, three of the other crimes proffered by the government (the Ross, Kopulos and Jahoda extortions) formed the basis of previous charges against Salerno that went to verdict.[2]

In an effort to deflect Salerno's objections, the government maintained that Salerno's alleged other crimes were admissible to prove the "enterprise" element of 18 U.S.C. § 1952B (1984), now cited as 18 U.S.C. § 1959.

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[2] In a 1985 federal indictment naming Salerno as a defendant, a jury acquitted Salerno of the extortion of David Kopulos, but convicted him of allegations relating to the extortion of Joel Ross. Tr. 13, 17; R. 2100, 2105.

According to the government, "the only way . . . to prove the existence of the enterprise [was] through the illegal activities committed on its behalf." R. 2105. In response, defense counsel orally informed the district court that Salerno did not intend to contest the existence of the "enterprise." Tr. 40-42. In spite of this, the district court acceded to the government's theory, and permitted the admission of extensive other crimes evidence. *United States v. Salerno*, 1995 WL 66347 (N.D. Ill. 1994), Appendix C; R. 2120-21; Tr. 16. The Seventh Circuit affirmed this decision. *United States v. Salerno*, 108 F.3d 730, 740 (7th Cir. 1997), Appendix A.

Before the Seventh Circuit issued its opinion in this case, this Court handed down *Old Chief v. United States*, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), a case which dealt with application of Rule 403 of the Federal Rules of Evidence in a situation where the defendant offered to concede an essential element of the government's proof. In the present case, however, the Seventh Circuit did not even cite, let alone discuss, *Old Chief*. Moreover, as discussed below, the Seventh's Circuit's affirmance conflicts with the Rule 403 principles as set forth in *Old Chief*.

As *Old Chief* makes clear, evidence of the accused committing other crimes not spelled out in the indictment carries inherent potential for prejudice. The reason for the prohibition is because bad act evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). *See also Old Chief*, 136 L.Ed.2d at 588.

The other crimes evidence in this case—involving a slew of alleged extortionate acts allegedly committed by Salerno—was patently prejudicial. *Cf. Old Chief*, 136 L.Ed.2d at 584 (in a possession of a weapon by felon case, the record of the defendant's previous conviction, which included the name and nature of the prior offense, risked a verdict "tainted by improper considerations").

The question thus becomes whether the prejudicial nature of the other crimes evidence substantially outweighed the probative value. Fed. R. Evid. 403. In making this determination, the prosecution's need for the evidence may be considered. *E.g.*, *Old Chief*, 136 L.Ed.2d at 590; *United States v. Yeagin*, 927 F.2d 798, 802-03 (5th Cir. 1991); Fed. R. Evid. 401 and 403, Advisory Committee's Notes.

Here, the government had no great need for the evidence—absent the desire to tar and feather Salerno with past bad acts in hopes the jury would return a guilty verdict based upon propensity considerations. While the government claimed the evidence was admissible to show "enterprise," this was not even a contested issue at the retrial.[3] Indeed, Salerno represented pretrial that he

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[3] The introduction of the other crimes evidence in this case also rested upon a fundamental misconception. Contrary to the government's position, "enterprise" is not established by the "illegal activities committed on its behalf." R. 2105. Rather, "enterprise" is proved by evidence of structure, or the functioning as a continuing unit, apart from the commission of racketeering acts. *See United States v. Turkette*, 452 U.S. 576 (1981). *See also Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995) (an "enterprise" must be more than a group of people who conspire or commit a "pattern of rack-

(continued...)

would not be defending on an absence-of-enterprise theory, and did not in fact offer such defense. Further, it was not as if the prosecution lacked other evidence of structure, not carrying the sully of crimes not specifically charged in the indictment. Jahoda gave detailed testimony concerning the structure of the alleged enterprise. The extensive surveillance evidence, Tr. 604-75, also tended to show structure. In addition, Salerno's statements during the tape-recorded conversations with Jahoda evidenced structure. As the existence of the "enterprise" was not a contested issue, and the government had access to "enterprise" evidence not carrying other crimes baggage, the prejudicial nature of the other crimes evidence substantially outweighed probative value.

It also cannot be forgotten that Salerno previously was prosecuted to verdict for the Ross, Kopulos and Jahoda extortions, and acquitted of the Kopulos and Jahoda allegations. Prior prosecutions may be considered in the balancing process. *See United States v. Morris*, 79 F.3d 409, 411-12 (5th Cir. 1996); *United States v. Phillips*, 401 F.2d 301, 306 (1968). As this Court stated in *Dowling v. United States*, 493 U.S. 342 (1990):

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[3] (...continued)
eteering activity"); *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991) ("If the 'enterprise' is just a name for the crimes the defendants committed, or for their agreement to commit these crimes that was charged separately in the conspiracy count, then it would not be an enterprise within the meaning of the statute. Otherwise two statutory elements—enterprise and pattern—would be collapsed into one."). In light of *Turkette*, the notion that Salerno's alleged other offenses established "enterprise" rested on faulty grounds.

> We recognize that the introduction of evidence in circumstances like those involved here has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial. The question, however, is whether it is acceptable to deal with the potential for abuse through nonconstitutional sources like the Federal Rules of Evidence . . .

Id. at 352.

In the end, the introduction of vast other crimes deprived Salerno of a fair trial. Such evidence diverted the jury's attention from the real issue in the case, i.e., the credibility of Jahoda's testimony concerning alleged observations of Salerno on February 7, 1985. The other crimes evidence risked conviction based not upon the strength of the government's case, but based upon Salerno being painted as a bad man. This was impermissible.

Unfortunately, the Seventh Circuit's opinion simply failed to address the obvious prejudice associated with Salerno's other crimes. Nor did the Seventh Circuit concern itself with the fact that the verdict may have been based upon propensity considerations resulting from the admission of the voluminous other crimes evidence. Furthermore, the Seventh Circuit did not undertake to balance the prosecution's need for the evidence against the fact that "enterprise" was not contested by the defense. Rather, the Seventh Circuit simply dismissed Salerno's argument that the other crimes evidence was unnecessary (since the existence of the "enterprise" was uncontested) as an argument "without consequence." *Salerno*, 108 F.3d at 740. Finally, the Seventh Circuit

did not deal with this Court's suggestion in *Dowling*, i.e., that other crimes instances previously prosecuted to verdict can be addressed through the rules of evidence.[4]

In sum, the Seventh Circuit's opinion in this case ignored the teachings of *Old Chief* and other cases. The Seventh Circuit does not have license to slight pertinent decisions of this Court. Accordingly, *certiorari* should be granted, or this cause should be remanded for reconsideration in light of *Old Chief*.

II.

THE SEVENTH CIRCUIT'S DECISION FINDING NO VIOLATION OF THE SPEEDY TRIAL ACT DESPITE A 17 MONTH DELAY BETWEEN THE DECLARATION OF A MISTRIAL AND THE GOVERNMENT'S ANNOUNCEMENT OF INTENTION TO RETRY SALERNO REPRESENTS A MISAPPLICATION OF THE SPEEDY TRIAL ACT AND CONTRAVENES THIS COURT'S PRONOUNCEMENT IN *UNITED STATES v. HENDERSON*, 476 U.S. 321, 329 (1986).

Following the first jury's discharge on March 10, 1992, the district court did not enter an order tolling time under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Supp.R. 2227. It was not until August 24, 1993—seventeen months after the discharge of the first jury—that

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[4] Forcing Salerno to defend against alleged conduct comprising previously prosecuted offenses also impeded upon the core values embodied in the Double Jeopardy Clause: that the government not be allowed to hone its trial strategies and perfect its evidence through successive prosecutions. *E.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); *Green v. United States*, 355 U.S. 184, 187-88 (1957).

the district court expressly excluded time. Supp.R. 2227. The 17 month lull prompted Salerno's Motion to Dismiss Based Upon Violation of Right to Speedy Trial. Supp.R. 2227. The district court, however, denied the motion, *United States v. Salerno*, 1994 WL 30955 (N.D. Ill. 1994), Appendix B, and the Seventh Circuit affirmed. *United States v. Salerno*, 108 F.3d 730 (7th Cir. 1997), Appendix A.

The Seventh Circuit acknowledged that under 18 U.S.C. § 3161(e), when a defendant is to be retried following a jury's failure to reach a verdict, the trial must commence within 70 days from the jury's discharge, save excludable periods. *Salerno*, 108 F.3d at 735. While far more than 70 days elapsed between the first jury's discharge and the government's declaration of intention to retry Salerno alone, the Seventh Circuit deemed the entire 17 month period excludable under 18 U.S.C. §§ 3161(h)(1) and (h)(7). *Id.* at 735-36. The court observed that under section 3161(h)(7) excludable delay of one defendant is imputed to codefendants, absent severance, and reasoned that the time during which Salerno's codefendants filed, and the district court grappled with, post-trial and sentencing motions was excludable under section 3161(h)(1).[5] *Id.* at 736-37. The court of appeals

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[5] The reliance upon 18 U.S.C. § 3161(h)(7) is questionable. When the district court found the entire 17 month period between the end of the first trial and the government's announcement of intention to retry Salerno excludable, Salerno simply was no longer "joined for trial with [codefendants]," 18 U.S.C. § 3161(h)(7). Under the circumstances of this case, attributing hypothetical exclusions of former codefendants to a lone defendant facing trial does not keep with the purpose of section 3161(h)(7), which is to avoid the time, expense and

(continued...)

further deemed the period of delay "reasonable" within the meaning of section 3161(h)(7).[6] *Id.* at 737-38.

The Seventh Circuit ruled that litigation of Salerno's codefendants' post-trial and sentencing motions constituted generic "other proceeding[s]" under the first clause of 18 U.S.C. § 3161(h)(1). This finding, however, allowed the exception to swallow the rule, and trumped section 3161(h)(1)(J). As opposed to being "other proceedings" not falling within any of the specific categories set forth in section 3161(h)(1)(A)-(J), post-trial and sentencing motions amount to "proceeding[s] concerning the defendant," fitting within section 3161(h)(1)(J). In relying upon section 3161(h)(1)'s general and introductory language while avoiding and ignoring the implications of the

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[5] (...continued)
inconvenience of separate prosecutions. *See, e.g., United States v. Tanner*, 941 F.2d 574, 580 (7th Cir. 1991). Here, of course, there were no separate trials.

[6] This finding—far exceeding section 3161(h)(1)(J)'s 30 day yardstick—conflicts with other appellate decisions. *Cf. United States v. Stayton*, 791 F.2d 17, 23 (2nd Cir. 1986) (23 month delay unreasonable); *United States v. Jackson*, 542 F.2d 403, 407 (7th Cir. 1976) (12 month delay presumptively unreasonable); *United States v. Lockett*, 526 F.2d 1110, 1111 (7th Cir. 1975) (24 month delay unreasonably long); *United States v. Detienne*, 468 F.2d 151, 156 (7th Cir. 1972) (19 month delay triggered further speedy trial analysis). *See also* 18 U.S.C. § 3161(h)(9) (1 year to obtain evidence believed to be in a foreign country). Moreover, Salerno was prejudiced by the delay. As a result of the lag between the first and second trials, the government honed trial strategies, creating new evidence and digging up a plethora of dated other crimes, not offered or admitted at the first trial. Of course, all during the lengthy delay, Salerno had unresolved criminal charges looming over his head.

more specific section 3161(h)(1)(J), the Seventh Circuit violated "the canon of statutory interpretation that a more specific statutory provision takes precedence over a more general provision." *Salerno*, 108 F.3d at 737.

This Court has expressly recognized that Congress did "not intend to permit circumvention of the 30-days 'under advisement' provision in Subsection (H)(1)(J)." *United States v. Henderson*, 476 U.S. 321, 329 (1986) (citing S. Rep. No. 96-212 at 34). But this is what happened here. The lower court's rationale allows violations of the time limits set forth in sections 3161(h)(1)(A)-(J) to be avoided simply by proclaiming the proceeding causing delay to be encompassed within the generic "other proceeding" language of section 3161(h)(1). This cannot be, and conflicts with this Court's decision in *Henderson*. Consequently, *certiorari* should be granted.

CONCLUSION

WHEREFORE, Petitioner Robert Salerno respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to review the judgment of the Seventh Circuit. In the alternative, Petitioner Robert Salerno respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment for further consideration in light of this Court's decision in *Old Chief v. United States*, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), or grant any other appropriate relief.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3577

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT SALERNO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 87—**Ann Claire Williams**, *Judge*.

ARGUED OCTOBER 23, 1996—DECIDED MARCH 4, 1997

Before HARLINGTON WOOD, JR., RIPPLE, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Robert Salerno was convicted under 18 U.S.C. § 1952B[1] for murder and conspiracy to commit murder for the purpose of maintaining or increasing his position in a racketeering enterprise. He challenges his conviction on four grounds: 1) that the government violated the Speedy Trial Act by allowing 17 months to elapse between the conclusion of Salerno's first trial and the announcement of its intent to retry

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[1] In 1988, Congress renumbered this section to 18 U.S.C. § 1959.

Salerno; 2) that the district court erred in permitting the government to present extensive evidence of other crimes to show the existence of, and defendant's participation in, an enterprise; 3) that the admission of evidence of other crimes for which Salerno had been acquitted violated the issue preclusion component of the Double Jeopardy Clause; and 4) that the district court erred in admitting into evidence the government's scale model of the crime scene, which the jury was also permitted to examine during its deliberations. Because we find these claims to be without merit, we affirm the decision of the district court.

I. HISTORY

This case involves the murder of Hal Smith, allegedly by the defendant, Robert Salerno, and his cohorts Rocco Infelise, Louis Marino, and Robert Bellavia. All four men were members of the Ferriola Street Crew—a unit of Chicago's organized crime establishment, often referred to as the "Outfit." The Chicago Outfit operates through "street crews," and the Ferriola Street Crew (named after Joseph Ferriola, the boss of the crew from 1979 to 1989) engaged in a number of criminal activities including the collection of protection money (or "street tax") from bookmakers, houses of prostitution, and adult theaters. Infelise became the boss of the Ferriola Street Crew upon Ferriola's death in 1989.

On February 10, 1985, Smith's stabbed, strangled, and tortured body was found in the trunk of his own car. Smith ran a lucrative independent bookmaking operation in Lake County, Illinois. Beginning around 1981, Smith was aware that Marino and Salvatore DeLaurentis—another member of the Ferriola Street Crew—were attempting either to collect street taxes from independent bookmakers or to force them to become partners with the

Ferriola crew. After initially resisting these efforts, Smith and his two bookmaking partners began paying DeLaurentis $3,000 per month in street tax in 1983.

In late February or early March 1984, DeLaurentis arranged to meet Smith and one of his phone clerks at an Arlington Heights restaurant. At the meeting, DeLaurentis asked Smith to pay $6,000 per month in street tax. Smith offered to pay $3,000 and then $3,500, but DeLaurentis insisted upon the $6,000. At that point, Smith and DeLaurentis had a loud argument over who had more money and power, and they began throwing money at each other. Smith then ordered DeLaurentis to leave before he kicked his "olive oil smelling ass" back to Sicily. DeLaurentis retorted that Smith would be "trunk music."

In the spring of 1984, Infelise asked William Jahoda, an Outfit bookmaker, where Smith lived so that the street crew could collect the tax. Throughout the summer of 1984, Salerno, Infelise, Marino, and Bellavia used Jahoda's Long Grove, Illinois house as a base for their "stalking" operation of Smith in an attempt to learn his whereabouts and identify his car. On or about February 4, 1985, Infelise ordered Jahoda to bring Smith to Jahoda's house. Jahoda arranged to meet Smith at a tavern on February 7 and informed Infelise of the meeting.

On the afternoon of February 7, 1985, Salerno, Infelise, Marino, and Bellavia came to Jahoda's house. Infelise instructed Jahoda to bring Smith back to Jahoda's house in Smith's car. He also wanted Jahoda to remain outside and let Smith enter the house alone through the kitchen. That night, Jahoda met Smith and brought him back to his house. Smith entered the house by himself while Jahoda pretended to go to the mailbox. Jahoda saw Smith through the kitchen door and windows, and he saw Salerno come up behind Smith.

Jahoda waited in the garage until Infelise came outside looking for Smith's car. Infelise, however, returned to the kitchen to get Smith's car keys. At that time, Jahoda saw Smith lying on the kitchen floor but still conscious, surrounded by Bellavia, Marino, and Salerno. Marino removed Smith's car keys from Smith's coat pocket and gave them to Infelise. Infelise then drove Jahoda back to the tavern and instructed him to burn his clothes.

Everybody was gone when Jahoda returned home later that evening. Jahoda noticed that part of the kitchen floor had been mopped, and he found a brown bag, a plastic bag for vinyl twine, and a hardware store receipt. He also received a phone call from Infelise who asked Jahoda to look for a cigar and some glasses that Marino thought he had left behind. Jahoda did not find these items; the Arlington Police, however, later recovered both the cigar and glasses from Smith's car. In the years after the murder, Infelise, Bellavia, and Salerno made statements to Jahoda regarding the "stalk" and murder of Smith. Little did they know, however, that Jahoda became an informant for the government in April 1989.

A grand jury returned a multi-count superseding indictment against twenty individuals, including Salerno, charging them with a variety of crimes including RICO conspiracy. Salerno was also named in three RICO predicate acts and two substantive counts. Count 8 charged Salerno of conspiring with Infelise, DeLaurentis, Bellavia, and Marino to murder Smith in order to maintain or increase their positions in a racketeering enterprise. Count 9 charged Salerno, Infelise, Bellavia, and Marino with the actual murder of Smith, again for the purpose of maintaining or enhancing their positions in the enterprise.

The government's case against these defendants proceeded to trial, and on March 10, 1992, the jury delivered its verdict. The jury found Salerno not guilty of

RICO conspiracy, but it convicted Infelise, DeLaurentis, Bellavia, and Marino on the RICO conspiracy count, as well as other counts. The jury, however, could not reach a verdict on Counts 8 or 9 as to Salerno, Infelise, Bellavia, and Marino.[2] Seventeen months later, the government announced its intention to retry only Salerno on Counts 8 and 9. In the second trial, a jury found Salerno guilty on both counts.

II. ANALYSIS

A. *Speedy Trial Act*

The first issue on appeal is whether the district court erred in finding no violation of the Speedy Trial Act despite the fact that 17 months elapsed between the first jury's verdict and the government's announcement that it would retry Salerno on Counts 8 and 9. We review a district court's interpretation of the Speedy Trial Act *de novo* and its factual findings for clear error. *United States v. Wimberly*, 60 F.3d 281, 284 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 744 (1996).

On March 10, 1992, the jury in the first trial returned a partial verdict against the five defendants, including Salerno. Although four defendants—*i.e.*, Infelise, Marino, DeLaurentis, and Bellavia—were found guilty on the RICO conspiracy count, Salerno was acquitted of this charge. The jury, however, failed to reach a verdict for Infelise, Marino, Bellavia, and Salerno on Counts 8 and 9 of the indictment, which charged them with conspiring to murder and the actual murder of Smith in order to maintain or increase their positions in a racketeering

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[2] The jury found DeLaurentis guilty on Count 8, but the district court vacated this verdict and declared a mistrial on December 30, 1992.

enterprise. Thus, these defendants remained subject to retrial on Counts 8 and 9.[3]

After the first trial, the district court endured an onslaught of complex post-trial and sentencing motions from the defendants and the government. The district court later described the post-trial proceedings as "remarkable for both the breadth and complexity of the issues presented," noting that it "issued more than a dozen separate opinions, totaling more than 400 pages." Memorandum Opinion and Order, *United States v. Salerno*, No. 90 CR 87-5, at 2 (N.D. Ill. Jan. 26, 1994) (denying Salerno's motion to dismiss the indictment based on the Speedy Trial Act). After the resolution of the post-trial motions and sentencing proceedings, the government pronounced that it would retry only Salerno on Counts 8 and 9. At that point, Salerno complained that the government violated the Speedy Trial Act by not beginning his retrial within the 70-day statutory period. *See* 18 U.S.C. § 3161(e). The district court denied Salerno's motion to dismiss the indictment, finding the entire period from March 10, 1992 to August 24, 1993 to be excludable under 18 U.S.C. §§ 3161(h)(1) and (h)(7).[4]

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[3] As noted above, DeLaurentis was also subject to retrial on Count 8 after the district court vacated the jury's guilty verdict as to that count.

[4] The district court found that excludable delay based on § 3161(h)(1)(F), which excludes time for the prompt disposition of pretrial motions, began on August 24, 1993—the day the government announced its intention to retry Salerno. The defendant does not complain about the exclusion of time from this point (August 24, 1993) up to the beginning of the trial (February 7, 1995). Thus, the only period at issue here is the 17-month period from the date of the partial verdict in Salerno's first trial (March 10, 1992) to the announcement of Salerno's retrial (August 24, 1993).

Section 3161(e) of the Speedy Trial Act provides, in part, that when a "defendant is to be tried again following a declaration by the trial judge of a mistrial . . . the trial shall commence within seventy days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). This section further provides, however, that the "periods of delay enumerated in Section 3161(h) are excluded in computing the time limitations specified in this section." *Id.*

It is undisputed that 70 days passed between the date of the verdict in the first trial ("the date the action occasioning the trial bec[ame] final") and the government's statement of its intention to retry Salerno on Counts 8 and 9. Thus, we must determine whether the district court correctly decided that the 17-month "post-trial" period was properly excludable for Speedy Trial Act purposes.

Because this was a multiple-defendant prosecution, we first turn to § 3161(h)(7) to guide our analysis. That section provides an exclusion for a "reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). We have repeatedly held that under this section, "the excludable delay of one defendant may be ascribed to all codefendants in the same case, absent severance." *United States v. Tanner*, 941 F.2d 574, 580 (7th Cir. 1991) (quoting *United States v. Dennis*, 737 F.2d 617, 620 (7th Cir. 1984)). In this case, Salerno and his four codefendants were all subject to retrial on Counts 8 or 9, and Salerno neither sought nor was granted severance from his codefendants. Therefore, any reasonable period of time that could be excluded as to Infelise, Marino, DeLaurentis, or Bellavia could similarly be excluded as to Salerno.

We agree with the district court that the entire period from March 10, 1992 to August 24, 1993 was excludable as to Salerno's codefendants. Section 3161(h)(1) generally provides for the exclusion of a "period of delay resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1). That section also supplies a non-exhaustive list of proceedings in which a period of delay "shall be excluded" in computing the time within which the trial must commence. *See United States v. Garrett*, 720 F.2d 705, 709 (D.C. Cir. 1983) (noting that the listed proceedings in § 3161(h)(1)(A)-(J) are "merely illustrative and not intended to be exhaustive"). Section 3161(h)(1) exclusions "operate automatically" to deduct time from the Speedy Trial Act clock, *United States v. Montoya*, 827 F.2d 143, 151 (7th Cir. 1987), and courts have discretion to determine "the nature of *those proceedings* which fall within the 'other proceedings' language" of that section, *United States v. Lopez-Espindola*, 632 F.2d 107, 110 (9th Cir. 1980).

The proceedings in this case—post-trial and sentencing motions—are not expressly cited as excludable under § 3161(h)(1). Nonetheless, the district court properly found that these post-trial matters are "other proceedings" within the general language of § 3161(h)(1). In that regard, courts have adopted a broad interpretation of "other proceedings," *Garrett*, 720 F.2d at 710, and found excludable delay in the following instances: time spent in a defendant's plea bargaining negotiations, *Montoya*, 827 F.2d at 150; time spent litigating a codefendant's bond violation and subsequent bail hearing, *Garrett*, 720 F.2d at 709-10; and time spent by an appellant in state custody due to probation revocation proceedings, *Lopez-Espindola*, 632 F.2d at 110.

In this case, we similarly find that the time spent litigating post-trial motions and resolving sentencing disputes was excludable under § 3161(h)(1). The entire time

between March 10, 1992 and August 24, 1993 was necessary to resolve several complex, post-trial issues including defendants' motions for new trials, DeLaurentis's motion to vacate his conviction, defendants' joint motion to dismiss based on the government's alleged taping of attorney-client conversations at the Metropolitan Correctional Center (MCC), defendants' motions to interview jurors with regard to written communications received by the court from a juror, Infelise's supplemental motion for a new trial, defendants' motion for the government to release its MCC investigative report, and defendants' motion to reconsider the court's prior denial of an evidentiary hearing. During this entire time, the court was also forced to adjudicate several sentencing issues regarding Salerno's codefendants, including extensive challenges to defendants' Presentence Investigation Reports (PSIs), the government's motions for upward departure, and the defendants' objections to those motions.

Without pointing to any specific dates or providing any calculation of nonexcludable days of delay, Salerno simply claims that the period from January 22, 1993 (the denial of Infelise's Supplemental Motion for a New Trial) to August 17, 1993 (the "finalization" of the sentencing process) was a "period of inaction" in excess of the 70-day Speedy Trial Act requirement. After our own review of the docket we understand why the defendant failed to calculate the exact number of nonexcludable days during this alleged 207-day "period of inactivity"—there are simply too many overlapping post-trial and sentencing motions during this time period for anyone to ferret out over 70 days of unexcludable delay.[5] As such,

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[5] For example, by January 22, 1993, the court and the government were still waiting for some defendants' responses to the government's motion for upward departure from the sen-

(continued...)

we find no Speedy Trial Act violation.

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[5] (...continued)

tencing guidelines, which it had filed on September 16, 1992. Our review of the docket shows that in the several months after the government filed its motion, several defendants objected to the motion, and the government subsequently responded to these objections. On March 5, 1993, the government responded to DeLaurentis's objections. Thus, as of March 5, 1993, there are zero days of unexcludable delay that count towards the Speedy Trial clock.

Meanwhile, the government and DeLaurentis were litigating DeLaurentis's motion for a mistrial, thereby postponing the litigation regarding his PSI. The PSIs for all the defendants were completed in late August 1992, and the other defendants had been litigating their objections to their PSIs in the subsequent months. On April 13, 1993, DeLaurentis finally filed his objections to his PSI; the government responded on May 10, 1993, and DeLaurentis replied on June 21, 1993. Considering the overlap between the litigation involving the upward departure motions and the objections to DeLaurentis's PSI, there are still zero days of unexcludable delay as of June 21, 1993.

On July 15 and 16, 1993, the district court issued lengthy opinions ruling on defendants' various objections. Then on July 22, 1993, the government filed a separate motion for upward departure regarding DeLaurentis; DeLaurentis responded, and the government filed its reply on August 12, 1993. Thus, the entire time from July 22, 1993 to August 12, 1993 is excludable. Adding the 31 days from June 21 to July 22, and the 5 days from August 12 to August 17, we are left with only 36 days of unexcludable delay.

This example (which did not even consider the several other pending motions or subtract the 30 days for the time that the court actually took the motions under advisement) thus demonstrates that the period from January 22 to August 17, 1993 was anything but a "period of inaction," and that the actions of the government and the district court were well within the confines of the 70-day limit of the Speedy Trial Act.

We reject defendant's argument that the district court erred in relying upon the "general and introductory" language of § 3161(h)(1) rather than the more specific requirements of § 3161(h)(1)(J) ("subsection (J)"). Subsection (J) excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J). Our determination that delays from the post-trial and sentencing proceedings are excludable under § 3161(h)(1)'s general language does not offend the cannon of statutory interpretation that a more specific statutory provision takes precedence over a more general provision. Subsection (J) is not a catch-all provision that encompasses every single proceeding not covered in the other subsections of § 3161(h)(1). Rather, subsection (J) automatically provides a 30-day exclusion for periods covering any proceedings once they are *actually taken under advisement* by the district court, *i.e.*, after the court has all of the necessary materials and has conducted the appropriate hearings to decide the issue. *See Henderson v. United States*, 476 U.S. 321, 328-29 (1986) (finding that § 3161(h)(1)(J) "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' *i.e.*, 30 days from the time the court receives all the papers it reasonably expects").

Moreover, in this circuit we have further determined that subsection (J)'s 30-day requirement cannot limit subsection (F), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F). In that regard, we have reasoned that the Speedy Trial Act cannot compel a district court to decide numerous pretrial motions "within a short, fixed period of time," and thus have held that "in a case of multiple pretrial motions the

limitation is not 30 days, but reasonable promptness." *United States v. Tibboel*, 753 F.2d 608, 612 (7th Cir. 1985) (finding 42 days reasonable to consider 7 pretrial motions); *see United States v. Cheek*, 3 F.3d 1057, 1066-67 (7th Cir. 1993) (finding 50-day delay reasonable for adjudicating 24 pretrial motions); *United States v. Latham*, 754 F.2d 747, 753 (7th Cir. 1985) (finding 68 days reasonable to consider 8 pretrial motions).

Finally, as we noted above, § 3161(h)(1) expressly states that the provided list of proceedings is not exclusive. Thus, defendant's reading of the statute would render useless Congress's express determination that delays resulting from proceedings not detailed under § 3161(h)(1) could nonetheless be excluded for Speedy Trial Act purposes.

Because the time spent litigating post-trial motions and sentencing issues was excludable against Salerno's codefendants, we must now determine whether that 17-month delay was reasonable under § 3161(h)(7). The facts of each particular case determine the reasonableness of the delay. *See Tanner*, 941 F.2d at 580; *Dennis*, 737 F.2d at 621. Considering § 3161(h)(7)'s preference for the judicial efficiency of joint trials, *see Dennis*, 737 F.2d at 621, as well as the magnitude and complexity of the issues involved in the post-trial and sentencing proceedings of this case, we easily find that the delay here was reasonable. All five defendants were subject to retrial on Counts 8 or 9 for their joint participation in the murder of Hal Smith, and at no point did Salerno move for severance. *See id.* The mere fact that the government ultimately chose (*after* the disposition of the post-trial and sentencing issues) to retry only Salerno on Counts 8 and 9 does not run counter to our reasoning. Moreover, our review of the record reveals that the district court handled the deluge of post-trial motions and sentencing objections in a commendable manner. Thus,

we agree that the 17-month delay needed to adjudicate the post-trial motions and sentencing issues was reasonable.

We also find that defendant was not substantially prejudiced by the delay. The mere passage of time, without more, is not dispositive. *See Barker v. Wingo*, 407 U.S. 514, 532, 534 (1972); *Dennis*, 737 F.2d at 621 (finding that the 144-day delay before defendant's trial was not "presumptively prejudicial" under *Barker v. Wingo*); *cf. Doggett v. United States*, 505 U.S. 647, 655 (1992). Defendant claims that the delay improperly permitted the government to hone its trial strategies and perfect its evidence. However, "'[p]rejudice' is not caused by allowing the Government properly to strengthen its case, but rather by delays intended to hamper defendant's ability to present his defense." *United States v. Tedesco*, 726 F.2d 1216, 1221 (7th Cir. 1984). Defendant has provided us with no persuasive evidence demonstrating that he was somehow less able to present an adequate defense due to the passage of time. Finally, defendant cannot convincingly claim that he was prejudiced by the "unresolved criminal charges looming over his head." He was neither incarcerated during the 17-month period, nor did he seek to modify his bond conditions during that time. Considering all of these factors, we find the defendant's Speedy Trial Act claim to be without merit.

B. Admission of the "Enterprise" Evidence

Salerno next argues that the district court improperly allowed the government to present evidence of other crimes allegedly committed by him in order to prove the "enterprise" elements of the crimes charged in the indictment. We review evidentiary determinations for abuse of discretion, giving "special deference" to the discretion of

the district court. *United States v. Stephens*, 46 F.3d 587, 597 (7th Cir. 1995).

At Salerno's second trial, the government sought to introduce evidence of prior crimes allegedly committed by Salerno and others in order to establish the existence of a racketeering enterprise as required by § 1952B. In particular, this evidence revealed defendant's prior participation in demanding and collecting street taxes on behalf of the Ferriola Street Crew. Salerno objected to the admission of this testimony, some of which was not offered by the government at the first trial, arguing that it was not in furtherance of the charged conspiracy, that it concerned uncharged acts, and that its probative value was substantially outweighed by its unfair prejudice. The district court excluded the testimony of one witness (Robert Cooley), finding that the danger of its unfair prejudice substantially outweighed its probative value; the court, however, permitted the government to introduce the testimony of the other witnesses (David Kopulos, Joel Ross, William Jahoda, Richard Mara, Carmen Migliore, and George Boulahanis), finding their testimony relevant to establish the existence of, and Salerno's participation in, the charged enterprise. We find that the district court did not abuse its discretion in permitting the government to introduce this evidence.

In order to convict Salerno for the charged crimes the government was required to prove, beyond a reasonable doubt, the existence of an enterprise. Because enterprise was an essential element of the crimes charged, the proffered evidence cannot properly be characterized as "other crimes" evidence, and thus, Federal Rule of Evidence 404(b) does not apply. *See United States v. Blyden*, 964 F.2d 1375, 1378 (3d Cir. 1992); *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989); *United States v. Neapolitan*, 791 F.2d 489, 506 (7th Cir. 1986); *see also United States v. Jackson*, 33 F.3d 866, 873 (7th Cir.

1994) (finding Rule 404(b) inapplicable because defendant's failure to file tax returns was "intricately connected" with the charged conspiracy to impede and obstruct the IRS). We must, however, still address defendant's argument that the proffered evidence was irrelevant and unfairly prejudicial because it did not prove, nor was it necessary to prove, the charged enterprise.

As defined under 18 U.S.C. § 1952B, an enterprise "includes . . . any union or group of individuals associated in fact although not a legal entity . . . ." 18 U.S.C. § 1952B(b)(2) (1984) (renumbered 18 U.S.C. § 1959(b)(2)). The Supreme Court has characterized an "association-in-fact enterprise," as "a group of persons associated together for a common purpose of engaging in a course of conduct," and "an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583 (1981) (interpreting "enterprise" under RICO's definition, 18 U.S.C. § 1961(4)); *see United States v. Rogers*, 89 F.3d 1326, 1335 (7th Cir.) (finding that § 1959(b)(2)'s [§ 1952B(b)(2)'s] definition of "enterprise" is the same as under RICO's definition at § 1961(4)), *cert. denied*, 117 S. Ct. 495 (1996); *United States v. Concepcion*, 983 F.2d 369, 380 (2d Cir. 1992) (same). In that regard, the Court noted that a party proves enterprise through "evidence of an ongoing organization, formal or informal, and by evidence that the various associates [of the organization] function as a continuing unit." *Turkette*, 452 U.S. at 583.

Although the "existence of an enterprise at all times remains a separate element which must be proved by the Government," it is also firmly established that the "proof used to establish these separate elements [of 'enterprise' and 'pattern of racketeering activity'] may in particular cases coalesce." *Id.*; *see Rogers*, 89 F.3d at 1336-37; *United States v. Kragness*, 830 F.2d 842, 856 n.11 (8th Cir. 1987); *United States v. Mazzei*, 700 F.2d

85, 89 (2d Cir. 1983). This is such a case. It is difficult to comprehend how one could prove the existence of an enterprise comprised of "a group of individuals associated in fact," and organized solely for the purpose of committing crimes, without presenting evidence of the crimes that detail the structure, common purpose, and continuity of the charged enterprise. Thus, we have allowed the government to use uncharged criminal acts in a RICO prosecution to prove the nature of an enterprise and the defendant's participation in it. *See, e.g.*, *Neapolitan*, 791 F.2d at 501, 506.

The indictment in this case defined the enterprise as "The Joseph Ferriola Street Crew"—an "association in fact" of seventeen named individuals, as well as others known and unknown. The indictment charged that the enterprise operated from 1974 through the date of the indictment, and that it engaged in multiple racketeering acts including murder, extortion, illegal wagering, loansharking, and bribery.

Salerno primarily challenges the witness testimony that revealed his participation in demanding and collecting street taxes, and the witnesses' belief that Salerno was acting on behalf of the Ferriola Street Crew in these instances. Such evidence was clearly probative of Salerno's connection to the enterprise and the enterprise's need to murder Hal Smith for refusing to pay the street tax.

Defendant complains that some of this testimony was irrelevant in demonstrating the charged enterprise because it detailed his extortionate activities with others not explicitly named in the indictment as members of the enterprise. This argument, however, overlooks the fact that the indictment named as members of the enterprise seventeen individuals, as well as others "known and unknown."

Moreover, even though the government could, and apparently did, provide other evidence of the enterprise's structure via surveillance witnesses and undercover tape recordings, these sources of evidence make no less relevant the live testimony of people previously involved in extortions by Salerno and other members of the Ferriola Street Crew. In particular, the challenged testimony provided evidence of the leadership within the enterprise, the scope of the enterprise, the specialized functions of various crew members, the crew's method of collecting the street tax, the crew's desire to tax independent bookmakers, and perhaps most importantly, Salerno's actual participation in enterprise activities. Considering the experienced district court's explicit Rule 403 analysis of this evidence, we easily find that the court did not abuse its discretion in admitting the evidence.[6]

Salerno's argument that this enterprise evidence was irrelevant because he did not contest the existence of an enterprise is without consequence. Defendant offered no stipulation concerning the enterprise element, *see United States v. Brown*, 34 F.3d 569, 573 (7th Cir. 1994), and his lawyer's pretrial statement that he would not argue at trial that Salerno did not know other enterprise members is hardly a concession that the charged enterprise existed.

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[6] We also reject defendant's untimely argument that these prior extortions were "stale criminal acts, unconnected to the specific time-frame charged." Contrary to defendant's assertions, the relevant time frame was not between the fall of 1984 and February 7, 1985. The indictment specifically charged that the enterprise (an essential element of the crimes) began in 1974 and continued up to 1990 (August 19, 1990—the date of the original indictment). All of the "stale" crime evidence fell within this period.

We similarly find without merit defendant's argument that reversal is warranted because the jury instructions did not limit the jury's consideration of this challenged evidence to the enterprise issue. Although defendant objected to the admission of the enterprise evidence, he never requested a limiting instruction directing the jury to consider it only in regard to proving the charged "enterprise" and not towards proving the charged "racketeering activity." Before the Supreme Court's decision in *United States v. Olano*, 113 S. Ct. 1770 (1993), we had typically reviewed a district court's failure to provide an unrequested jury instruction for plain error. *See United States v. Maloney*, 71 F.3d 645, 663 (7th Cir. 1995) (discussing our cases before and after *Olano*), *cert. denied*, 117 S. Ct. 295 (1996); *United States v. Liefer*, 778 F.2d 1236, 1243-44 (7th Cir. 1985). In this case, however, defendant was well aware of the potential need for such a limiting instruction. Thus, his lack of a request for such an instruction coupled with his affirmative acceptance of the court's final jury instructions demonstrates that he intentionally relinquished his known right to have the jury consider the extortion evidence for a limited purpose, *see Olano*, 113 S. Ct. at 1777, and thus amounts to waiver of the issue. *See United States v. Espino*, 32 F.3d 253, 258-59 (7th Cir. 1994); *United States v. Lakich*, 23 F.3d 1203, 1207-08 (7th Cir. 1994); *see also* Fed. R. Crim. P. 30.[7]

However, even if defendant's failure to request such an instruction amounted to forfeiture of the issue rather than waiver, *see Olano*, 113 S. Ct. at 1777, he has still

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[7] Rule 30 provides, in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."

not shown plain error. Whether defendant's counsel neglected to request such an instruction as a tactical move, or simply as an oversight, he cannot convincingly argue that the district court erred in failing to provide a limiting instruction *sua sponte*. *See United States v. Gregory*, 74 F.3d 819, 822 (7th Cir. 1996); *Liefer*, 778 F.2d at 1243-44 & n.4. Such a cautionary instruction was simply not required in this case where the challenged evidence tended to prove defendant's participation in the charged enterprise, *see United States v. Perholtz*, 842 F.2d 343, 359 (D.C. Cir. 1988) (ruling that no cautionary instruction was necessary where the challenged evidence tended to prove the continuity of an association-in-fact enterprise), and where the court had determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

C. Issue Preclusion

Salerno next argues that the government violated the issue preclusion component of the Double Jeopardy Clause by admitting evidence of offenses for which he had been previously acquitted. We use a *de novo* standard of review for issue preclusion determinations. *United States v. Bailin*, 977 F.2d 270, 281 (7th Cir. 1992); *United States v. Gentile*, 816 F.2d 1157, 1161 (7th Cir. 1987).

Specifically, defendant claims that the district court violated the issue preclusion (or collateral estoppel) component of the Double Jeopardy Clause by allowing the government to present evidence of the alleged extortions of William Jahoda and David Kopulos by the Ferriola Street Crew. In a 1985 federal trial, a jury found Salerno not guilty of extorting Kopulos. In the first trial of this case, a jury acquitted Salerno of RICO conspiracy, and in doing so, it expressly found that Salerno did not agree

to the charged intimidation or extortion of Jahoda. The district court denied defendant's pretrial motion to preclude this "extortion" evidence, finding it relevant "to show the existence of, and defendant's membership in, the conspiracy."

Issue preclusion in the criminal context means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *accord Bailin*, 977 F.2d at 274. In *Bailin*, we listed the three procedural rules that govern the application of issue preclusion in criminal cases. First, courts should not apply the collateral estoppel rules in a hypertechnical manner, but rather should examine the pleadings, evidence, charge, and other relevant matter to determine whether a rational jury could have based its verdict on an issue other than the one the defendant seeks to foreclose from consideration. *Bailin*, 977 F.2d at 280; *see Ashe*, 397 U.S. at 443. Second, issue preclusion only applies when a relevant issue in a subsequent prosecution is an "ultimate issue," *i.e.*, an issue that must be proven beyond a reasonable doubt. *Bailin*, 977 F.2d at 280; *see Dowling v. United States*, 493 U.S. 342, 348-51 (1990). Third, the defendant bears the burden of proving that this ultimate issue was necessarily determined by the prior jury. *Bailin*, 977 F.2d at 280; *see Dowling*, 493 U.S. at 350-51.

In this case, Salerno cannot demonstrate that extortion was an "ultimate issue" at his retrial, or that the prior acquittals necessarily determined that the charged enterprise or its racketeering activity did not exist. While defendant properly asserts that the juries in the two prior trials failed to find him guilty of extorting money from Kopulos or Jahoda, that question is completely irrelevant in this trial. At Salerno's retrial, the govern-

ment needed to prove that the charged enterprise existed, that defendant was a member of it, and that the enterprise engaged in racketeering activity (in addition to proving the various elements for murder and conspiracy to commit murder). The government, however, was not required to prove that Salerno ever extorted Kopulos and Jahoda. As such, these were not "ultimate issues" for issue preclusion purposes.

Moreover, defendant cannot show that the existence of the enterprise, the defendant's membership in the enterprise, or the fact that the enterprise engaged in racketeering activity were necessarily precluded by Salerno's prior acquittals on the two extortion charges. In fact, we previously found on interlocutory appeal that an entirely plausible reading of the verdict from Salerno's first trial was that the "jury believed that Salerno was associated with the enterprise (or never reached that question in its deliberations) but could not agree on whether he participated in the murder." *United States v. Salerno*, 1994 WL 399196, No. 94-1331, at *1 (7th Cir. August 1, 1994) (unpublished order). In this regard, one can easily envision a situation where Salerno did not extort Kopulos or Jahoda, yet still find that the Ferriola Street Crew existed, that Salerno was a member of the Crew, and that the Crew engaged in racketeering activity.

The crux of defendant's argument rests on the fact that jury was permitted to consider the evidence of these acquitted extortions not only as proof of enterprise, but also as proof of racketeering activity. The final instructions given to the jury provided that the government was not required to show that Salerno "personally perform[ed] or agree[d] to personally participate in any racketeering activity committed by the enterprise" in order to prove that the enterprise engaged in racketeering activity. (Jury Instruction, No. 39.) That same jury instruction, however, stated that "[o]ne way the govern-

ment may establish that a defendant knew racketeering activity would be committed by the enterprise is by proving the defendant committed racketeering activity on behalf of the enterprise." *Id.* Defendant thus argues that this instruction permitted the jury to use the two extortion acquittals as evidence of racketeering activity.

Defendant's argument, however, fails for three reasons. First, the jury was never required to find that Salerno extorted anybody; the government needed to show only that the enterprise engaged in racketeering activity. Thus, the issue of extortion was never an "ultimate issue" at Salerno's retrial. Second, defendant has not met his burden of demonstrating that the jury necessarily used the evidence from two prior extortions to satisfy the racketeering activity element. The government presented abundant evidence—aside from the acquitted extortions—detailing the enterprise's racketeering activity and Salerno's knowledge of and participation in this activity. This case is unlike a RICO prosecution where the jury's need to find explicitly specific predicate acts could more easily demonstrate that a prior judgment of acquittal had necessarily precluded an issue from the jury's consideration. *See, e.g., Bailin*, 977 F.2d at 282-83.

Third, defendant neither requested a limiting jury instruction, nor objected to the final instructions submitted to the jury by the court; thus, he cannot claim such an error here. Defendant failed to request that the district court instruct the jury of the limited nature of the extortion evidence when it was first introduced by the government, he failed to offer a proposed instruction regarding the extortion evidence at the end of the case, and he affirmatively agreed to the set of jury instructions on this issue that was ultimately given by the district court. Based on these actions, it appears that defendant intentionally relinquished his known right to

have the jury consider the extortion acquittals for only a limited purpose, and thus has waived any such argument on appeal. *See Olano*, 113 S. Ct. at 1776; *Espino*, 32 F.3d at 259; *Lakich*, 23 F.3d 1207-08.[8]

Even under plain error review, Salerno would not be entitled to relief. The district court committed no error (plain or otherwise) either in admitting the Kopulos and Jahoda extortion testimony, or in failing to instruct the jury regarding the limited purpose for which the testimony was offered. Salerno's prior acquittals did not *necessarily* preclude this jury's finding that the Ferriola Street Crew enterprise existed and engaged in racketeering activity. As such, we reject defendant's issue preclusion claim.

D. Admission of the Scale Model of the Crime Scene

In his final argument, Salerno contends that the district court erroneously admitted into evidence a scale

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[8] Defendant seemed to shift his argument in order to avoid the waiver problem. In his initial brief, defendant claimed that the district court erred by failing to limit the admission of the extortion evidence for a *particular* purpose—*i.e.*, as evidence of enterprise. After the government raised the waiver issue, however, defendant asserted in his reply brief that the court erred in admitting the extortion evidence for *any* purpose.

If we assume that defendant's argument is as he states in his reply brief—*i.e.*, that he objected to the *introduction* of the evidence, not to the court's failure to provide a limiting instruction—we find that he cannot now claim that the district court erred by failing to limit the scope of the extortion evidence. Defendant's assertion that "[i]t is questionable whether a limiting instruction would have done any good," (Appellant's Reply Br. at 16 n.7), demonstrates that his decision not to request a limiting instruction may have been a tactical move, and thus, eases our finding of waiver.

model of the crime scene, which the jury was permitted to examine during its deliberations. We review a district court's determination regarding the admissibility of demonstrative evidence, as well as its decision to send material to the jury room, for a clear abuse of discretion. *United States v. Hofer*, 995 F.2d 746, 748 (7th Cir. 1993); *United States v. Burrell*, 963 F.2d 976, 982 (7th Cir. 1992). Determinations regarding Federal Rule of Criminal Procedure 16 are "committed to the sound discretion of the district court, and we will reverse only for abuse of discretion prejudicial to the substantial rights of the defendant." *United States v. D'Antoni*, 856 F.2d 975, 984 (7th Cir. 1988) (quoting *United States v. Koopmans*, 757 F.2d 901, 906 (7th Cir. 1985)).

At Salerno's second trial, the government introduced into evidence a scale model of the crime scene (Jahoda's house), which depicted part of the house, the driveway, the individuals involved in the crime, and the victim's car. Before the scale model was finished, the government informed the defendant of its intent to use the model. The model was completed shortly before the trial, and the government informed defendant of its completion. On the day of opening statements, the government offered defendant's lawyers the opportunity to review the model, but they refused.

One week later—the day the government intended to put Jahoda on the witness stand—the government presented defendant with a proposed stipulation regarding the creation of the scale model. An FBI Visual Information Specialist had built the model based on photographs, plat surveys, floorplans, and footprints. The proposed stipulation fueled defendant's discovery objections, which claimed that the government had not allowed him enough time to inspect the model, had failed to provide "expert" materials regarding the builder of the model (*e.g.*, a curriculum vitae), and did not produce the in-

formation upon which the builder relied. Specifically, defendant complained that although he was aware of the model, he was unaware that the model would be used in an "expert" fashion. The district court overruled the objections, reasoning that the model was a demonstrative aid and thus, it was not the subject of expert testimony. The court also ordered the government to turn over the documents on which the model was built, which the government promptly provided later that day.

Due to some days off in the trial schedule, the government did not actually introduce the model into evidence for another week. At that point, the government used the model during Jahoda's testimony in order to help the eyewitness explain the movements of the individuals allegedly involved in Smith's murder on February 7, 1985. Because the parties never agreed to a stipulation regarding the creation and accuracy of the model, the model maker provided foundational testimony one week after the government first used the model with Jahoda.

Salerno first contends that he was prejudiced by the government's belated disclosure of the scale model, as well as the government's failure to disclose a written summary of the "expert" testimony of the model builder. Defendant asserts that these belated and non-disclosures violated Federal Rule of Criminal Procedure 16, thereby depriving him of the opportunity to investigate the model, to obtain his own expert witness, to make an informed plea decision, or to reformulate his trial strategy.

Rule 16 of the Federal Rules of Criminal Procedure provides that "[u]pon request of the defendant the government shall permit the defendant to inspect and copy or photograph . . . tangible objects . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial." Fed. R. Crim.

P. 16(a)(1)(C). It further states that at the defendant's request, the government must disclose "a written summary of [expert] testimony" that it intends to use. Fed. R. Crim. P. 16(a)(1)(E). "To succeed in obtaining a reversal on appeal" for a discovery violation, "a defendant must prove both an abuse of discretion and prejudice." *United States v. Alvarez*, 987 F.2d 77, 85 (1st Cir. 1993).

Initially, we note that it is doubtful that the government violated Rule 16. Before the trial began, the government apprised the defendant that it intended to use the scale model. Once the model was completed, the government afforded defendant ample opportunity (two full weeks) to inspect it before its introduction into evidence, which the drawn-out trial schedule readily reflects.[9]

Nor was it apparent that the government violated Rule 16(a)(1)(E) by failing to turn over a summary of expert testimony. From the record, it does not appear that the defendant ever requested any expert discovery material, as Rule 16 required him to do, until the fourth day of trial. On that day, the court ruled that admission of the scale model did not require expert testimony; as such, there was no expert testimony for the government to summarize. In that regard, the district court did not err in determining that the model was demonstrative evidence that did not require the testimony of an expert.

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[9] Due to federal holidays and a judicial conference, trial was conducted on February 7-8, 13-16, 21-22, 27, and March 1, 1995. The government invited the defendant to examine the scale model on February 7, the day of opening statements. Upon receiving the government's proposed stipulation regarding the model on February 14, defendant first objected to its admission. That was also the first time that the defendant availed himself of the opportunity to inspect the model. The government first used the scale model in court on February 21.

Although the model maker was a FBI Video Information Specialist who had testified as an expert in the past, his testimony in this trial was merely foundational. Moreover, the government promptly complied with any request for "expert" material that defendant may have made by turning over the floorplans, blueprints, and other materials used by the model maker on the very day those materials were requested by the defendant.

Even if the government had violated Rule 16, defendant certainly has not demonstrated that he was substantially prejudiced by any belated disclosure of the scale model or the non-disclosure of any "expert" materials of the model maker. "Substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense or if the mistake substantially influences the jury." *United States v. Camargo-Vergara*, 57 F.3d 993, 998-99 (11th Cir. 1995). Defendant has failed to show such deficiencies here.

As shown above, defendant had at least two weeks after the government invited him to inspect the model, and one week after he actually examined the model, to obtain expert witnesses or otherwise alter his trial strategy. Additionally, Salerno never indicated how additional preparation time would have altered his strategy, nor does the record reflect any evidence that defendant sought out his own expert to examine the model. *See Koopmans*, 757 F.2d at 906. Along those lines, we note that defendant's counsel knew before trial that the government was going to use a scale model or "mock up" of the crime scene; thus, defendant could have retained an expert at that point in case such an expert was needed later in the trial. Moreover, the record does not suggest that defendant's cross-examination of either Jahoda or the model maker was impaired by any delays. *See United States v. Caudill*, 915 F.2d 294, 299-300 (7th Cir. 1990); *Koopmans*, 757 F.2d at 906.

Salerno next asserts that the district court abused its discretion in the way it allowed the government to use and publish the scale model. When the government first introduced the model, it sought to have the jury file past it. Defendant objected, complaining that this presentation was "overly dramatic" and prejudicial, analogizing it to mourners filing past a deceased person's casket. The court overruled defendant's objection and permitted jurors to file past the model on that occasion and at two more times during the trial.

Rule 611(a) of the Federal Rules of Evidence declares that the "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and the presentation effective for the ascertainment of the truth . . . ." Demonstrative aids are regularly used to clarify or illustrate testimony. *See, e.g., Roland v. Langlois*, 945 F.2d 956, 963 (7th Cir. 1991) (admitting life-sized replica of amusement park ride into evidence); *United States v. Towns*, 913 F.2d 434, 445-46 (7th Cir. 1990) (admitting ski mask and gun into evidence for demonstrative purpose of providing examples of the mask and gun used at a bank robbery).

The record in this case reveals that the district court was concerned about whether all of the jurors could view the model from their places in the jury box. After coming to the conclusion that several of the jurors would not be able see it, the court allowed the jurors to file past the exhibit. In doing so, however, the court also instructed the government that when the jurors walked by the model they could not elicit testimony from the witness, the witness had to return to the witness box, and the government agents and prosecutors could not stand near the model. The court clearly did not abuse its discretion in allowing the jury to file past the model of the crime scene. If anything, defendant's use of the model during

the cross-examination of Jahoda—by having the witness stand next to the exhibit while speculating whether the model was accurate—was more dramatic than the government's use of it.

Salerno's final argument is that he was prejudiced by the court's decision to let the scale model go to the jury room during its deliberation. Defendant claims that this crucial piece of demonstrative evidence took on an "air of infallibility" that improperly bolstered the eyewitness's (Jahoda's) credibility. He also argues that the model's presence during jury deliberations allowed the government's witness to "in effect accompan[y] the jury into the jury room." *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957).

"[A]s long as the district court is evenhanded in its evidentiary rulings, [it] has wide discretion in determining whether an exhibit will be allowed to go into the jury deliberation room." *Hofer*, 995 F.2d at 749 (citing *United States v. Samples*, 713 F.2d 298, 303 (7th Cir. 1983)). In this case, nothing in the record suggests that the district court favored the government over the defendant in making its evidentiary determinations. Specifically, the court permitted some of defendant's arguably misleading photographs of the crime scene to go to the jury room along with the government's scale model. Moreover, defendant's lawyer thoroughly challenged the testimony of both Jahoda and the model maker on cross-examination. In particular, defense counsel placed a defendant's exhibit sticker on the model to illustrate the location of the eyewitness. Thus, defendant cannot argue that only the "government's voice" regarding the model was heard in the jury room.

Finally, the district court made an explicit Federal Rule of Evidence 403 determination regarding the admission of the model and its delivery to the jury room. We look upon a district court's Rule 403 balancing with

a "special degree of deference." *United States v. Crockett*, 979 F.2d 1204, 1211 (7th Cir. 1992). Although in some cases it may be better practice to exclude demonstrative evidence from the jury room in order to reduce the potential for unfair prejudice, *see Towns*, 913 F.2d at 446, in this case, the district court certainly did not abuse its discretion. *See United States v. Cox*, 633 F.2d 871, 874-75 (9th Cir. 1980) (admitting "mock-up bombs" into evidence for illustrative purposes and permitting them to go to the jury room).

For these reasons, we AFFIRM the defendant's conviction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

(Cite as: 1994 WL 30955 (N.D.Ill.))

UNITED STATES of America

v.

Robert SALERNO.

No. 90 CR 87-5.

United States District Court, N.D. Illinois.

Feb. 1, 1994.

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

This matter is before the court on Defendant Robert Salerno's Motions to Dismiss this Case for Violation of His Right to A Speedy Trial and to Estop the Government from Proving Certain Essential Elements Decided in His Favor at the Prior Trial. For the reasons explained below, the court denies both of Salerno's motions.

Background

On March 10, 1992, the jury in this case returned a partial verdict against the five trial defendants—Rocco Infelise, Salvatore DeLaurentis, Louis Marino, Robert Bellavia, and movant Robert Salerno. Infelise, DeLaurentis, Marino, and Bellavia were inter alia found guilty of RICO conspiracy as charged in Count One of the indictment. Movant Salerno was acquitted of this RICO

conspiracy charge. The jury, however, was unable to reach a verdict against Infelise, Marino, Bellavia, and Salerno on Counts Eight and Nine of the Indictment which charged Salerno and his codefendants with conspiracy to murder and the actual murder of bookmaker Hal Smith. As a result, Salerno and his codefendants remained subject to retrial by the government on these Counts.

Following the trial, Salerno's codefendants and the government filed, and the court decided, numerous complex post-trial motions. Salerno's codefendants and the government also extensively litigated various sentencing issues. As explained in more detail below, these post-trial proceedings were remarkable for both the breadth and complexity of the issues presented. Although some of the issues raised in these proceedings were common to all trial defendants, many were peculiar to the special circumstances of each individual defendant. In all, the court issued more than a dozen separate opinions, totalling more than 400 pages.[1] On August 17, 1993, all remaining post-trial and sentencing issues concerning Salerno's codefendants Infelise, Marino, and Bellavia were decided. Three days later, the court denied DeLaurentis' motion to reconsider the court's sentencing order. The post-trial phase of this case was at an end. On August 19, 1993, Infelise, Marino, and Bellavia were sentenced. DeLaurentis was sentenced on August 24, 1993.

On August 24, 1993, following the sentencing of DeLaurentis, the government announced its intention to

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[1] For a detailed discussion of these post-trial proceedings through April 1993, see this court's Memorandum and Opinion and Order, dated April 14, 1993.

proceed to trial on Counts Eight and Nine against Salerno only. Salerno was the only trial defendant not to have been convicted of any of the charged offenses. The court then granted the government's subsequent motion to dismiss Counts Eight and Nine of the indictment against defendants Infelise, Marino, DeLaurentis, and Bellavia. On August 31, 1993, the court set a briefing schedule for pretrial motions and at the government's request, found that excludable delay under section 3161(h)(1)(F) of the Speedy Trial Act began on August 24, 1993.[2]

Discussion

I. Motion to Dismiss for Violation of the Speedy Trial Act

18 U.S.C. § 3161(e) provides in relevant part:

> If the defendant is to be tried again following a declaration by the trial judge of a mistrial . . . the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. . . . The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section.

Correctly noting that "the action occasioning [his] retrial"—this court's dismissal of the jury after it reached its partial verdict—occurred on March 10, 1992, Salerno

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[2] Section 3161(h)(1)(F) of the Speedy Trial Act excludes any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" in computing the time within which the trial on a charged offense must commence.

argues that the government's indictment should be dismissed because more than seventy days of unexcluded time has long since passed, in violation of the express dictates of section 3161(e) of the Speedy Trial Act. (Def. Motion at 2-4). As explained below, the court denies Salerno's motion because it finds that the entire period from March 10, 1992 to August 24, 1993 is excludable under 18 U.S.C. §§ 3161(h)(1) and 3161(h)(7).

The Seventh Circuit has repeatedly held that under § 3161(h)(7) "'the excludable delay of one defendant may be ascribed to all codefendants in the same case, absent severance.'" United States v. Tanner, 941 F.2d 574, 580 (7th Cir.1991) (quoting United States v. Dennis, 737 F.2d 617, 620 (7th Cir.1984)).[3] See also United States v. Rush, 738 F.2d 497, 504 (1st Cir.1984) ("(h)(7) 'stops the [speedy trial] clock for one defendant in the same manner and for the same amount of time as for all co-defendants") (citations omitted). As noted above, Salerno and his four codefendants were all subject to retrial on Counts Eight and Nine of the government's indictment.[4] Because Salerno had neither sought, nor was granted, severance from his co-defendants, he can be ascribed the excludable delay of his codefendants under § 3161(h)(7)

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[3] Section 3161(h)(7) provides for the exclusion of "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

[4] Although the jury returned a verdict of guilty against defendant DeLaurentis on Count Eight, this court vacated the verdict and declared a mistrial on this Count on December 30, 1992.

as long as this delay is reasonable.[5] Thus, the court must decide first whether the period from March 10, 1992 to August 24, 1993 was excludable for Salerno's codefendants, and second, whether this delay was reasonable.

The court has little difficulty concluding that the period from the dismissal of the jury in March 1992 to the sentencing of Infelise, Marino, Bellavia, and DeLaurentis in August 1993, a period during which the defendants filed and the court grappled with a vast array of overlapping post-trial and sentencing motions, would have been excluded under 3161(h) if the government had decided to proceed to trial against them on Counts 8 and 9 of the indictment. Section 3161(h)(1) provides for the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant ". . . ." The "other proceedings" designated in 3161(h)(1) include but are not limited to the ten specific proceedings described in subparts (A) through (J) of that same section. United States v. Montoya, 827 F.2d 143, 150 (7th Cir.1987).

Although the litigation and adjudication of the defendants' post-trial motions and sentencing objections is not expressly cited as an excludable proceeding in subparts (A) through (J), the court finds that this period is prop-

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[5] Although at least two circuits have held that a defendant who has failed to move for severance cannot challenge the reasonableness of the delay under 3161(h)(7), United States v. Vasquez, 918 F.2d 329 (2d Cir.1990) and United States v. Mayes, 917 F.2d 457 (10th Cir.1990), the Seventh Circuit implicitly rejected this approach in Dennis, 737 F.2d. at 621 and Tanner, 941 F.2d at 580, 580 n. 7. In both cases, the court suggested that while a defendant's failure to move for severance was certainly relevant to the court's reasonableness inquiry under 3161(h)(7), it did not preclude the inquiry altogether.

erly considered a section 3161(h)(1) "proceeding" stopping the clock on Salerno's Speedy Trial Act claim.[6] As the government notes, courts have long interpreted the term "proceeding" broadly for Speedy Trial Act purposes. See United States v. Robinson, 887 F.2d 651, 656 (6th Cir. 1989) (citing United States v. Henderson, 476 U.S. 321 (1986). As the court explained in United States v. Garrett, 720 F.2d 705, 709-710 (D.C.Cir.1983), Congress specifically intended for § 3161(h) to be applied flexibly, affording judges the discretion to exclude time under the Speedy Trial Act in a variety of situations not expressly anticipated within the statute itself.

> Thus, the Congress, with the active cooperation of the Department of Justice and other interested parties, made a conscientious effort to set forth with reasonable particularity the types of delay which, it hoped, would be excluded as a matter of practice consistent with the objectives to be served by the Act. Modifications made to serve that end were substantial following the introduction of the Act's legislative predecessors. Yet, by the same token both this Committee and its House counterpart took pains to forestall the possibility that a desire to be instructively particular not be misinterpreted as exclusively inflexible.

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[6] The court notes in passing that this type of post-mistrial proceeding could reasonably be found to fall within the scope of subpart (D) ("delay resulting from trial with respect to other charges against the defendant") and arguably even subpart (F) (delay resulting from any pretrial motion) of § 3161(h)(1). However, as explained below, the court finds that the litigation and adjudication of defendants' post-trial and sentencing motions is best categorized as a generic "other proceeding" under the first clause of subsection 3161(h)(1).

S.Rep. No. 212, 96th Cong., 1st Sess. 10 (1979) (quoted in Garrett, 720 F.2d at 710).

In Garrett, the court held that a codefendant's bond violation and subsequent bail hearing constituted an "other proceeding" justifying the exclusion of the resulting delay in the defendant-appellant's trial. Id., 720 F.2d at 709-710. Similarly, in United States v. Lopez-Espindola, 632 F.2d 107, 110 (9th Cir.1980), the court also looked beyond those grounds specifically enumerated in 3161(H)(1)(A)-(J) to hold that the period during which the appellant was in state custody because of probation revocation proceedings similarly fell within the scope of the "other proceedings" language of the Speedy Trial Act. See also Montoya, 827 F.2d at 150 ("[t]he plea bargaining process also can qualify as one of many 'other proceedings' under the generic exclusion of section 3161(h)(1).").

The proceedings at issue in the instant case began on March 10, 1992, when the court set a briefing schedule for the filing of post-trial motions just after the jury entered its partial verdict. Given the complexity of this multi-defendant case, and the integrity and zeal with which the defendants' counsel had represented their clients prior to and throughout trial, the court fully expected, and received, detailed motions for a new trial. These motions were fully briefed on June 17, 1992. On August 27, 1992, the court issued a 24-page opinion, denying Defendants' Motion for a new trial.

Meanwhile, on July 1, 1992, the court had set briefing schedules for the filing of defendant DeLaurentis' motion to vacate his conviction on Count Eight and the defendants' post-trial motion to dismiss the indictment based

on the government's alleged taping of attorney-client conversations at the Metropolitan Correctional Center. This issue was fully briefed on July 31, 1992, the court issued its Memorandum Opinion and Order denying defendants' motion to dismiss on September 24, 1992. On December 30, 1992, the court issued a 40-page opinion granting DeLaurentis' motion to vacate the guilty verdict entered against him on Count Eight and denying defendants' previously filed motion regarding the interview of, and written communication with, the jurors. On January 5, 1993, Infelise filed a supplemental motion for a new trial which the court denied on January 22, 1993.

Throughout this period, the defendants and government were also embroiled in extensive sentencing proceedings. As the government sets forth in its brief in opposition to Salerno's motion to dismiss, the government filed its version of the offense with the Probation Office in April 1992, and the presentence investigative reports for each of Salerno's codefendants was issued in late August 1992. Over the next several months the defendants and government fiercely litigated numerous complex and novel issues involving the application of the sentencing guidelines to their individual cases.

In addition to the defendants' extensive challenges to their PSI reports, the government and defendants filed several other sentencing motions over the course of the next several months. In September and October 1992, the government filed a motion for upward departure against all trial defendants. A separate motion for upward departure under § 3D1.4 of the United States Sentencing Guidelines was filed against DeLaurentis on July 22, 1993. The defendants' sentencing proceedings were not finalized until August 17, 1993 for defendants In-

felise, Marino, and Bellavia, and August 20, 1993 for DeLaurentis, when the court denied each defendant's motions for reconsideration of the court's previously issued sentencing opinions. These opinions (three in all) varied in length from 96 to 117 pages. On August, 24, 1993, the last of Salerno's codefendants was sentenced. Because the litigation and adjudication of these complex issues are properly considered "other proceedings" under 3161(h)(1), the entire period from March 10, 1992 to August 24, 1993 is excludable under the Speedy Trial Act.

Under § 3161(h)(7), this excludable time can be ascribed to Salerno as long as the period of delay is found to be "reasonable". As the court explained in Dennis, 737 F.2d at 620, "[i]n determining whether the delay was reasonable we are guided by the purpose Congress intended to serve when it enacted section 3161(h)(7)." The legislative history of this section clearly indicates that Congress expected delay resulting from the joinder of codefendants to be liberally excluded to allow for joint trials and to avoid "time, expense and inconvenience of separate prosecutions." S.Rep. No. 212, 96th Cong., 1st Sess. 24 (1979) (quoted in Dennis at 621); see also United States v. Novak, 715 F.2d 810, 814 (3d Cir.1983). Needless, to say this was a very expensive, and time consuming trial. Naturally, the court's rulings on these various post-trial motions and sentencing objections would inform the government's decision as to whether it would proceed to trial against the defendants Infelise, Marino, DeLaurentis, and Bellavia, along with movant Salerno, on Counts Eight and Nine of the indictment. Though the litigation and adjudication of Salerno's codefendants post-trial and sentencing motions were no doubt

time-consuming, in light of the substantial state interest in holding joint trials when possible in complex multi-defendant cases such as this one, the court finds that the period of delay was reasonable.

Significantly, at no time during the post-trial and sentencing proceedings did Salerno move to sever his case from the other defendants. Though not dispositive, this factor is certainly relevant to the court's reasonableness inquiry under § 3161(h)(7). Tanner, 941 F.2d at 580; Dennis, 737 F.2d at 621. Moreover, it does not appear that Salerno has been prejudiced in any way by the delay. He is not incarcerated, and as the government notes, he has taken no affirmative action to seek modification of his bond conditions at any time since the return of the jury's verdict. Accordingly, the court finds that the period from March 10, 1992 to August 24, 1993 is excludable under §§ 3161(h)(1) and 3161(h)(7) of the Speedy Trial Act.

II. Motion to Estop Government from Proving Essential Elements Decided in the Defendant's Favor at the Prior Trial

The Fifth Amendment's guarantee against double jeopardy encompasses the concept of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). United States v. Bailin, 977 F.2d 270, 273-74 (7th Cir.1992). In the criminal context, the doctrine of collateral estoppel or issue preclusion means simply that "'when an issue of ultimate fact has once been determined by a valid and final judgment [i.e., an acquittal], that issue cannot again be litigated between the same parties in any future lawsuit [i.e., a prosecution]." Bailin, 977 F.2d at 274 (quoting Ashe, at 443).

As the court explains in Bailin, three procedural rules govern the application of issue preclusion in criminal cases. First, the court must not apply the rule with the rigid "hypertechnical[ity] of a 19th century pleading book." Bailin, at 280 (quoting Ashe at 443). Instead the court must examine the record in the prior proceeding in determining whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe, at 443. Second, issue preclusion only applies in cases where the issue in consideration is an "ultimate issue" in the subsequent proceeding. Bailin, at 280. Dowling v. United States, 493 U.S. 342, 348-51 (1990). Finally, the defendant has the burden of proving that the jury's acquittal "necessarily determined issues, which, on retrial, must be proven beyond a reasonable doubt." Bailin, at 281.

Here, Salerno asserts that the concept of collateral estoppel contained in the Double Jeopardy clause bars the government from relitigating the issue of whether he was associated with the Joseph Ferriola Street Crew. Salerno argues that this issue was necessarily determined by the jury as part of its acquittal of Salerno on Count One of the indictment.[7] As Salerno explains, whether he was a member or associated with the Ferriola Street Crew is an element in both Counts Eight

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[7] As noted above, Count One of the Indictment charged Salerno with R.I.C.O. conspiracy in violation of 18 U.S.C. § 1962(d).

and Count Nine of the indictment.[8] After reviewing the record, especially the government indictment, the jury instructions, and the relevant jury verdict form, the court concludes that Salerno has not, and in fact cannot, sustain his burden of proof on this collateral estoppel issue.

To convict Salerno on Count One of the indictment, the jury was required to find that the government had proven the following four elements beyond a reasonable doubt:

1) the enterprise alleged in Count One existed;

2) that Salerno was associated with or employed by the enterprise;

3) that the defendant knowingly conspired with another person to conduct or participate, directly or indirectly, in the affairs of the enterprise through:

A) a pattern of racketeering activity consisting of the commission of at least two of the alleged racketeering acts or

B) the collection of one or more of the alleged collections of unlawful debt

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[8] Counts Eight and Nine of the Indictment charge Salerno with the conspiracy to murder and the actual murder of Hal Smith. To obtain a conviction on Count Eight, the government is required to prove beyond a reasonable doubt that Salerno participated in the substantive offenses for the purpose of . . . maintaining or increasing [his] position in the enterprise." 18 U.S.C. § 1959. A conviction on Count Nine can similarly be based in part on a determination in the government's favor on this issue.

4) that the activities of the enterprise affected interstate commerce.

(Instruction No. 41-1).

As the government points out, the jury must have decided elements one and four in the government's favor because it convicted the four other trial defendants on Count One. Thus, the jury necessarily acquitted Salerno because it found that the government failed to prove either the second or third elements.

Salerno asserts that the jury must have decided the second element—that he was associated with the criminal enterprise—in his favor because at trial his counsel focused a significant portion of his case on the government's failure to definitively link Salerno with the Joseph Ferriola Street Crew. Salerno persuasively notes that the government offered considerably less evidence at trial linking him with the criminal enterprise than was offered against the other trial defendants. (Motion at 3-5). He also quotes extensively from his attorney's closing argument in which his counsel stressed this relative lack of evidence in urging acquittal on Count One. (Id.).

Although Salerno has convincingly demonstrated that the jury certainly could have acquitted him because they found that he was not associated with the Ferriola Street Crew, he has failed to prove precisely what the Double Jeopardy clause requires of him—that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe, at 443. As noted above, the jury also could have acquitted Salerno on the grounds that the government had failed to prove the third element of

Count One, namely that Salerno had agreed to the commission of at least two of the three alleged racketeering acts with which he was charged.[9] (Jury Instruction No. 41-1). Since the completed jury verdict form for Salerno indicates that the jury expressly found that Salerno did not commit two of the three alleged acts (specifically, the attempted extortions or extortions of William Jahoda and Philip Caliendo), the jury was required to acquit Salerno on Count One regardless of whether or not it found him to be associated with the Ferriola Street Crew. Even though the jury may also have acquitted Salerno on the issue of his alleged association with the enterprise, a determination of this issue was not necessary to its decision to acquit.

Finally, the cases defendant cites in support of his issue preclusion argument are easily distinguishable from the case at hand. In Ashe, 397 U.S. 436, for example, the defendant was accused of being one of a group of men who robbed six poker players at gunpoint. He was tried and acquitted on a charge of robbing one of the victims. The government then sought to try him again for robbing a different victim. After specifically finding that the first trial turned on the issue of identity, the Court ruled that the defendant's acquittal in the first trial established the ultimate fact that he was not one of the robbers. Here, in contrast, the court simply cannot find that Salerno's acquittal necessarily turned on the jury's determination that he was not associated with the criminal enterprise.

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[9] The alleged acts consist of the extortion of William Jahoda, the extortion of Philip Caliendo, and the murder of Hal Smith. (Indictment, Count I).

Similarly, in Pettaway v. Plummer, 943 F.2d 1041 (9th Cir.1991), the court's ruling in favor of the defendant hinged on its finding that the jury in the first trial had necessarily decided a key element of the government's case in the defendant's favor. As the court explains in Plummer, in the defendant's first trial for murder, the jury found in a special verdict that the defendant had neither personally used a handgun, nor inflicted great bodily injury in the commission of the murder. Id., at 1043. This determination, the court held, barred the government from attempting to prove in a subsequent trial that the defendant personally used the gun in the commission of the offense. Id., at 1048. In the case at hand, however, the jury did not find in a special verdict that Salerno was not associated with the Ferriola Street Crew. Because Salerno has failed to prove that the jury necessarily determined that he was not associated with the Joseph Ferriola Street Crew, the government is not estopped from relitigating this issue at trial.

Conclusion

For the reasons explained above, Salerno's Motions to Dismiss this Case for Violation of His Right to A Speedy Trial and to Estop the Government from Proving Certain Essential Elements Decided in His Favor at the Prior Trial are denied.

APPENDIX C

(Cite as: 1995 WL 66347 (N.D.Ill.))

UNITED STATES of America

v.

Robert SALERNO.

90 CR 87-5.

United States District Court,
N.D. Illinois, Eastern Division.

Feb. 9, 1995.

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

On February 6, 1995, defendant Robert Salerno is scheduled to be retried on Counts 8 and 9 of the original indictment, charging him with conspiring to murder and actually murdering Hal Smith. This case is presently before the court on the parties' pre-trial motions. For the reasons stated below, the motions are granted in part and denied in part.

Discussion

I. Defendant's Motion to Preclude the Prosecution from Presenting Evidence of Uncharged Extortion Acts

A. Richard Mara—Defendant asserts that Mara testified regarding Salerno's involvement in the Ferriola crew's collection activities at a sentencing hearing fol-

lowing Salerno's 1984 racketeering conviction before Judge Moran. The government proposes to have Mara testify similarly in this trial to establish the existence of the charged criminal enterprise and Salerno's association with the enterprise. Defendants contend that to allow the government to present Mara's testimony would in effect subject him to punishment for conduct for which he has already been punished, in violation of the spirit, if not the letter, of the Fifth Amendment's double jeopardy clause.

The court disagrees. The Seventh Circuit has repeatedly upheld convictions based on evidence considered in prior sentencing proceedings involving the same defendant. See United States v. Troxell, 887 F.2d 830, 836 (7th Cir.1989); United States v. Brown, 785 F.2d 587, 592 (7th Cir.1986). See also United States v. Haygood, 502 F.2d 166, 169 (7th Cir.1974) ("[t]he fact that a particular charge is pending in another court may make it appropriate for the sentencing judge to inquire into that matter, but if he should attach some minimal significance to it, his exercise of the human faculty of judgment is not the constitutional equivalent of a formal judgment of the court forever barring a proceeding before another tribunal"). Especially here, where, the challenged evidence is being offered merely with respect to one element of a separate offense, the double jeopardy concerns raised by defendant simply do not apply.

B. Joel Ross—Defendant offers a similar argument with respect to the proposed testimony of Joel Ross. Ross' expected testimony in this trial will focus on extortion for which defendant was convicted in 1985. As with the Mara testimony, this testimony is offered to

establish the existence of the charged criminal enterprise and Salerno's association with the enterprise.

The Supreme Court's ruling in United States v. Dixon, 113 S.Ct. 2849 (1993), mandates the denial of defendant's double jeopardy challenge of Ross' proposed testimony. In Dixon, the Court held that a subsequent prosecution is not barred by the Double Jeopardy Clause if it is for an offense involving elements different from those at issue in the earlier case. Id. at 2856. Clearly, the trial of Salerno for the murder of Hal Smith involves proof of elements not present in Salerno's 1984-85 criminal case. Moreover, even prior to the Dixon court's rejection of the "same-conduct" test set forth in Grady v. Corbin, 495 U.S. 508 (1990), the Seventh Circuit had approved of the government's reliance on conduct that was the subject of prior prosecutions and convictions when seeking to establish the requisite plurality of predicate acts in subsequent RICO prosecutions. See United States v. O'Connor, 953 F.2d 338, 339 (7th Cir.1992). Defendant's motion to preclude the testimony of Joel Ross on double jeopardy grounds is denied.

C. Robert Cooley—Defendant's motion to preclude the proposed testimony of Robert Cooley is granted. The court has carefully reviewed the government's proffer and the related investigative report regarding Cooley's identification of Salerno in the company of Butch Petrocelli in 1978. The court is particularly concerned about Cooley's failure to see or hear the alleged interaction between Salerno and the collector hired by Smith. The mere fact that Cooley saw Salerno with Petrocelli around the same time Petrocelli was scheduled to meet with the enforcer simply is not probative enough of Salerno's membership in the charged enterprise to outweigh the

danger of unfair prejudice that the planned testimony poses.

D. David Kopulis—Defendant's motion to preclude Kopulis' testimony concerning Salerno's involvement in the collection of street tax for the Ferriola crew is denied. First, the court rejects defendant's issue preclusion argument for the reasons outlined below in the context of defendant's objections to Jahoda's proposed testimony. With respect to defendant's foundational objections, the court finds that the government's offer of proof establishes the foundation for the admissibility of these co-conspirator statements. The proffered evidence is sufficient to establish that the challenged statements were made in furtherance of, and during the course of, the conspiracy in question. The court also finds that the probative value of this evidence, particularly with respect to Salerno's association with the charged criminal enterprise, is not substantially outweighed by the danger of unfair prejudice.

E. Bobby Tavoularis—Defendant's motion to preclude Tavoularis' testimony concerning Salerno's involvement in the collection of street tax for the Ferriola crew is denied. The court finds that the government's offer of proof establishes the foundation for the admissibility of these co-conspirator statements. The court also finds that the probative value of this evidence, particularly with respect to Salerno's association with the charged criminal enterprise, is not substantially outweighed by the danger of unfair prejudice.

F. Carmen Migliore—Defendant's motion to preclude Migliore's testimony concerning Salerno's involvement in the collection of street tax for the Ferriola crew is denied.

The court finds that the government's offer of proof establishes the foundation for the admissibility of these co-conspirator statements. The court also finds that the probative value of this evidence, particularly with respect to Salerno's association with the charged criminal enterprise, is not substantially outweighed by the danger of unfair prejudice.

G. George Boulihanis—Defendant's motion to preclude Boulihanis' testimony concerning Salerno's involvement in the collection of street tax for the Ferriola crew is denied. The court finds that the government's offer of proof establishes the foundation for the admissibility of these co-conspirator statements. The court also finds that the probative value of this evidence, particularly with respect to Salerno's association with the charged criminal enterprise, is not substantially outweighed by the danger of unfair prejudice.

H. William Jahoda—Defendant argues that the doctrine of issue preclusion bars the government from introducing testimony relating to Salerno's alleged extortion of money from Jahoda and Kopulis while working for the Ferriola crew. As defendant points out, Salerno was acquitted on the Kopulis extortion following a jury trial before Judge Moran in 1984. In the first trial in this case, the jury specially found that the government had not proven Salerno's charged extortion of Jahoda beyond a reasonable doubt.

To prevail on his issue preclusion argument, defendant must show that the factual issues necessarily decided in these earlier proceedings are "ultimate issues," that must be proven beyond a reasonable doubt in his retrial on Counts 8 and 9. See January 26, 1994 Memorandum

Opinion and Order at 12 (quoting United States v. Bailin, 997 F.2d 270, 280 (7th Cir.1992) and Dowling v. United States, 493 U.S. 342, 348-51 (1990)). Defendant asserts that the juries in both cases necessarily decided that Salerno did not extort money from Kopulis or Jahoda (Def. Mo. at 12). True enough. However, this question is simply not an ultimate issue in Salerno's retrial. Here, the only ultimate issue remotely resembling the issues necessarily decided in the earlier proceedings is the question of whether Salerno was a member of the enterprise charged in Count One of the indictment. Critically, defendant has failed to establish that this factual issue was necessarily decided in the earlier proceedings. Indeed, one of the most plausible readings of the jury's verdict in the first trial in this case suggests exactly the opposite. Simply put, the significance of the previously charged acts to the instant case does not hinge on whether these acts amounted to extortion. Defendant's motion to preclude the testimony of Jahoda and Kopulis regarding extortionate acts for which Salerno has been previously acquitted is denied.

I. Relevancy of Uncharged Acts—As this court has previously ruled, uncharged acts, such as those discussed above, are admissible to show the existence of, and defendant's membership in, the conspiracy. See December 4, 1991 Memorandum Opinion and Order at 3-5.

II. The Government's Motions in Limine

A. The August 7, 1989 Conversation (Salerno's release from prison)—Government's motion is denied. Consistent with the court's October 31, 1991 ruling, the court again finds that the portion of this conversation concerning

Salerno was not in furtherance of the conspiracy charged in Count One of the indictment.

B. The November 1, 1989 Conversation (between Jahoda and Salerno)—Government's motion is granted in part. As this court has previously held in its October 28, 1991 Memorandum Opinion and Order, the challenged portion of this conversation is properly seen as in furtherance of the charged conspiracy. The court will reserve ruling on whether to admit the previously redacted portion of this conversation, concerning Salerno's probation.

C. The November 2, 1989 Conversation—Having received no objections to the government's motion to admit the previously redacted portion of this conversation, the court grants the motion.

D. Eastway 2 Exhibit (the wedding list)—The government's motion to admit the "Eastway 2" Exhibit will be granted if the defense contends that Salerno did not know, nor was a friend of, DeLaurentis. If the defense does not contest the existence of a relationship between Salerno and DeLaurentis, the "Eastway 2" exhibit will not be admitted.

E. Alcohol Abuse—The court's ruling with respect to evidence of Jahoda's abuse of alcohol remains the same as in the last trial. General substance abuse may not be inquired into during the cross-examination of Jahoda. However, the defense may inquire about Jahoda's consumption of alcohol on specific dates.

F. Father/Son Relationship—This issue was ruled on in court on February 2, 1995. Counsel may identify himself as defendant's son, but may not comment on the

nature of their relationship or offer any other information about his family.

Conclusion

For the foregoing reasons, Salerno's motion to preclude the prosecution from presenting evidence of uncharged extortion acts is granted in part and denied in part. The government's motion in limine is granted in part and denied in part.